(1)

Supreme Court, U.S.
FILED

03 386 SEP 2 - 2003

No._____

In The

Supreme Court of the United States

CHRISTOPHER HARRISON,
Petitioner

VS.

MARTIN DRAGOVICH, et al,
Respondents

On Petition For A Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

BURTON A. ROSE, ESQUIRE
Attorney for Petitioner
Washington West Building
235 South 8th Street
Philadelphia, PA 19106
(215) 925-5800

32 pp

QUESTION PRESENTED

I. Is the Petitioner entitled to the issuance of a Certificate of Appealability based upon his claim that his state court sentence was modified outside the term of court and therefore breached his right to due process of law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW. 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

STATEMENT OF REASONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 4

THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS ERRED IN REFUSING TO GRANT A CERTIFICATE OF APPEALABILITY WHERE PETITIONER'S DUE PROCESS CLAIM WOULD BE DEBATABLE AMONG JURISTS OF REASON.
. 4

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Anderson v. Harless, 459 U.S. 4 (1982) 6

Barefoot v. Estelle 463 U.S. 880, 893 ((1983) . . . 5

Bracy v. Gramley, 520 U.S. 899, 908 (1997) 8

Carlisle v. United States, 134 L. Ed. 2d 613 (1996) 6

Coleman v. Thompson, 501 U.S. 722 (1991) 5

Duncan v. Henry, 513 U.S. 364 (1995) 5, 6

Ex Parte Lange, 85 U.S. 163, 192 (1874) 6

Fay v. Noia, 372 U.S. 391, 423 (1963) 7

Frank v. Mangum, 35 S. Ct. 582 (1915) 7

Gilmore v. Taylor, 508 U.S. 333, 348 (1992) 7

Hicks v. Oklahoma, 100 S. Ct. 2227 (1980) 7

Hohn v. United States 524 U.S. 236, 241 (1998) . . 5

Miller-el vs. Cockrell, Director, Texas Department of Justice, 123 S. Ct. 1029 (February 25, 2003) . . 4, 5

Moore v. Dempsey, 261 U.S. 86, 91 (1923) 7

Picard v. Connor, 404 U.S. 270 (1971) 6

Slack v. McDaniel, 529 U.S. 473, 484 (2000) 4

United States v. Addonizio, 442 U.S. 178, 185 (1979) 7

Wolff v. McDonnell, 418 U.S. 539 (1972) 7

OPINIONS BELOW

See attached exhibits from United States Court of Appeals for the Third Circuit. Exhibit "A" is the Order of the Court dated November 22, 2002 denying the request for a Certificate of Appealability. Exhibit "B" is the Order of the Court dated June 3, 2003 denying rehearing. Exhibit "C" are the Order and Report of the United States District Court for the Eastern District of Pennsylvania dismissing the Petitioner's Petition for a Writ of Habeas Corpus.

JURISDICTION

This Court has jurisdiction to review Petitioner's request for a Certificate of Appealability pursuant to 28 U.S. Code Section 2253 and 28 U.S. Code Section 1254(1). The Petition for Rehearing was denied by the Court of Appeals on June 3, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petitioner claims that he was denied his right to due process of law under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On December 14, 1982, your Petitioner Christopher Harrison entered a guilty plea to rape and related offenses before the Honorable Alfred DiBona of the Philadelphia, Pennsylvania Court of Common Pleas as per CP 82-08-1782 et seq. On April 20, 1983, the Petitioner was sentenced by Judge DiBona to a term of 4 to 10 years imprisonment plus 5 years probation. On April 26, 1983, the Petitioner filed a Petition for Reconsideration of that sentence. At some point thereafter, the trial court vacated the original sentence. However, it was not until September 11, 1985, that the Petitioner appeared before Judge DiBona and was resentenced. Petitioner received a sentence in 1985 of 1 ½ to 3 years imprisonment as well as three terms of probation of 10 years to run concurrently with each other.

After Petitioner was convicted of new charges arising from an arrest of July 29, 1989, the Petitioner's probationary sentence was modified because of the violation of probation. On November 28, 1990, the Petitioner was sentenced to 3 consecutive terms of 5 to 10 years imprisonment.

The Petitioner took an appeal to the Superior Court of Pennsylvania but the judgment of sentence was affirmed on September 14, 1995 and the Supreme Court of Pennsylvania subsequently denied a Petition for Allowance of Appeal.

On April 3, 1997, the Petitioner filed a Petition seeking relief under the Pennsylvania Post Conviction Relief Act. However, on November 16, 1998, the Philadelphia Common Pleas Court granted a request from the prosecution to dismiss that collateral attack petition.

Petitioner took an appeal to the Superior Court of Pennsylvania but that appeal proved unsuccessful and the Supreme Court of Pennsylvania denied the Petitioner's Petition for Allowance of Appeal.

On February 3, 2001, the Petitioner filed the present Petition seeking a Writ of Habeas Corpus pursuant to 28 U.S. Code § 2254. That Petition was assigned to the Honorable Arnold C. Rapoport, United States Magistrate Judge as per Docket No. 01-CV-923. Judge Rapoport entered his Report and Recommendation on September 6, 2001, recommending that the Petition be dismissed. Petitioner filed timely objections to that Report and Recommendation with the Honorable John Fullam of the United States District Court for the Eastern District of Pennsylvania. However, by Order dated November 20, 2001, Judge Fullam denied the Petition for a Writ of Habeas Corpus without allowing for the issuance of a Certificate of Appealability.

Petitioner then filed an application for a Certificate of Appealability along with a Notice of Appeal to the United States Court of Appeals for the Third Circuit as per Docket No. 01-4390.

By Order dated November 22, 2002, a Panel of Circuit Judges composed of Judges Nygaard, Roth and Barry issued an Order denying the Petitioner's Application for a Certificate of Appealability pursuant to U.S. Code § 2253(c)(1). See Exhibit "A" attached hereto. The Petitioner filed an Application for Reconsideration of the Order denying his Application for Certificate of Appealability on March 6, 2003. However, by Order dated June 3, 2003, a copy of which is annexed hereto as Exhibit "B", that court denied this application, which was construed as a petition for rehearing en banc.

The Petitioner is now submitting a petition seeking a Writ of Certiorari from the Supreme Court of the United States.

STATEMENT OF REASONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS ERRED IN REFUSING TO GRANT A CERTIFICATE OF APPEALABILITY WHERE PETITIONER'S DUE PROCESS CLAIM WOULD BE DEBATABLE AMONG JURISTS OF REASON.

In **Miller-el vs. Cockrell, Director, Texas Department of Justice**, 123 S. Ct. 1029 (February 25, 2003), this Court held that a Certificate of Appealability pursuant to 28 U.S. Code § 2253 should be granted if the Petitioner has demonstrated a substantial showing of the denial of a constitutional right. In resolving that matter, a Court of Appeals is instructed to limit its examination to a threshold inquiry into the underlying merit of the claims of the Petitioner inasmuch as the Petitioner can satisfy the statutory standard by merely demonstrating that jurists of reason could disagree with the resolution of his constitutional claims. **Slack v. McDaniel**, 529 U.S. 473, 484 (2000). Had the United States Court of Appeals for the Third Circuit properly applied such principles to the Petitioner's application, it is respectfully submitted that a Certificate of Appealability would have been issued in this case. Therefore, this Petitioner respectfully prays that this Honorable Court overrule the decision of the United States Court of Appeals for the Third Circuit in this regard and remand this matter to that court for further proceedings.

It was not Petitioner's burden to prove that

his appeal would be successful, for a Certificate of Appealability may issue even where there is no certainty of ultimate relief. **Barefoot v. Estelle** 463 U.S. 880, 893 ((1983); **Miller-el v. Cockrell**, supra. While a Petitioner must prove something more than the absence of frivolity, it is sufficient for the prisoner to show that the claim can be "debatable" even though every jurist of reason might agree that, once the case has received full consideration, the Petitioner cannot prevail. Thus it is clear that a COA determination is a separate proceeding, distinct from the underlying merits of the case. **Hohn v. United States,** 524 U.S. 236, 241 (1998).

In the instant case, the Petitioner's question was sufficiently debatable for jurists of reason to grant a Certificate of Appealability. Petitioner had sought from the Court of Appeals a remand to the United States District Court for an evidentiary hearing at which time the Petitioner claimed that he would be able to demonstrate that the state court findings, which he was challenging in this federal habeas litigation, were incorrect by clear and convincing evidence pursuant to 28 U.S. Code § 2254(e)(1) as well as that corresponding factual determinations in the state court were objectively unreasonable in light of the record. As in **Miller-el**, supra, an examination of the record in this case will satisfy the Court that the denial of a COA was improper.

A. PETITIONER'S CLAIM WAS NOT PROCEDURALLY DEFAULTED.

The Court of Appeals for the Third Circuit has ruled that the Petitioner's claim was subject to a procedural default pursuant to **Duncan v. Henry**, 513 U.S. 364 (1995) and **Coleman v. Thompson**, 501 U.S. 722 (1991). The Petitioner's contention that there was no procedural default in this case is

clearly debatable among jurists of reason.

It has been Petitioner's position throughout the state collateral litigation that his initial sentence had been wrongfully and illegally modified beyond the 30 day jurisdictional limit provided by state law, and that this violation constituted a breach of Petitioner's federal constitutional right to due process of law. In that regard, the Petitioner cited to the state courts Supreme Court cases such as **Carlisle v. United States**, 134 L. Ed. 2d 613 (1996) and **Ex Parte Lange**, 85 U.S. 163, 192 (1874). These cases stand for the basic rule that a court possesses the power to reset its judgment during the term in which that judgment is rendered but not thereafter, and this rule is to be applied whether the matter is in a state or federal court. Although the Petitioner's collateral appeal in state court did not expressly offer federal constitutional terminology, it is submitted that his references to federal authorities such as **Carlisle** and **Lange** would have reasonably alerted the state courts to the due process aspect of his constitutional claims. All that would have been required of him was that he communicated to the state courts in some way that he was asserting a claim that relied, at least in part, on federal law. **Picard v. Connor**, 404 U.S. 270 (1971); **Anderson v. Harless**, 459 U.S. 4 (1982).

Unlike the Petitioner in **Duncan v. Henry**, supra, this Petitioner did adequately apprise the state courts of his claim of a violation of due process of law. Because the federal constitutional issue was presented here in such a way that those courts had an opportunity to be alerted to the existence of a federal constitutional question, the Petitioner has raised a debatable issue as to whether there has really been a procedural default and accordingly, it was error to have denied him the remedy of the grant of a Certificate of Appealability on this point.

B. THE PETITIONER'S DUE PROCESS CLAIM WOULD BE DEBATABLE AMONG JURISTS OF REASON.

In **Hicks v. Oklahoma**, 100 S. Ct. 2227 (1980), this Court held that a defendant in a criminal case has a substantial and legitimate expectation that he would not be deprived of his liberties except to the extent determined according to law and that under the Fourteenth Amendment Due Process Clause this interest in liberty is protected against arbitrary deprivation by a state.

As this Court stated in **Frank v. Mangum**, 35 S. Ct. 582 (1915), the due process of law that is guaranteed by the Fourteenth Amendment allows a federal habeas court to decide whether a petitioner has been deprived by a court of his liberty without due process of law, and for this purpose, a federal habeas court may inquire into the jurisdictional facts in the case. In accord is **Moore v. Dempsey**, 261 U.S. 86, 91 (1923) and **Fay v. Noia**, 372 U.S. 391, 423 (1963). While it is true that habeas relief does not lie because of a violation of state law, that principle has an exception where a person's liberty has been removed without due process of law inasmuch as this action constitutes a violation of the Fourteenth Amendment, worthy of correction by a federal habeas court. **Gilmore v. Taylor**, 508 U.S. 333, 348 (1992).

In the present case, the dispute which is at issue here is whether an adjudication by a state court has occurred when the state lacked judicial jurisdiction which thereby constituted a violation of the Due Process Clause of the Fourteenth Amendment, for which habeas corpus has long been an available remedy. **United States v. Addonizio**, 442 U.S. 178, 185 (1979); **Wolff v. McDonnell**, 418 U.S. 539 (1972).

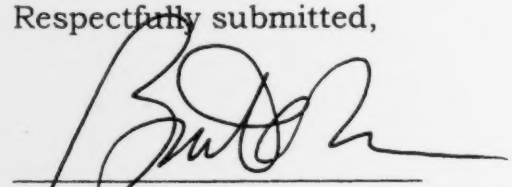
As this Court indicated in **Bracy v. Gramley**, 520 U.S. 899, 908 (1997), a federal habeas court has broad discretion to permit evidentiary hearings in cases where such relief is not precluded by statute. In the instant case, the Petitioner wishes to pursue his challenge under the Anti-Terrorism and Effective Death Penalty Act by completing the factual record in this case subsequent to a remand for that purpose pursuant to §2254(e). In this matter, the Petitioner could show at an evidentiary hearing that his sentence was modified out of time, subsequent to the term of the lower court. The conclusion by the Court of Appeals in its Order of November 22, 2002 that the Petitioner has not demonstrated that the state collateral attack court was wrong in finding that his sentence was vacated within thirty (30) days of imposition is erroneous. Should this Court approve the Petitioner's request for a remand, the Petitioner represents that he can establish that the state post conviction court erred in finding that his sentence was vacated within the thirty (30) day period. Because this question is absolutely crucial to Petitioner contention that he was entitled to the grant of a writ of habeas corpus, it is respectfully submitted that the Court of Appeals for the Third Circuit has erred by ruling that a Certificate of Appealability should not be issued.

CONCLUSION

For all the reasons expressed herein, your Petitioner Christopher Harrison respectfully prays this Honorable Court review the judgment of the United States Court of Appeals for the Third Circuit and conclude that a Certificate of Appealability as to this matter under 28 U.S. Code § 2254 should have been granted and that the matter ought to be

remanded to the lower courts for resolution of Petitioner's due process claim, in the interests of justice and fundamental fairness.

Respectfully submitted,



BURTON A. ROSE
Attorney for Petitioner

EXHIBITS

EXHIBIT A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING REQUEST FOR A CERTIFICATE OF APPEALABILITY DATED NOVEMBER 22, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 01-4390

(E.D. Pa. Civ. No. 01-cv-00923)

CHRISTOPHER HARRISON

v.

MARTIN DRAGOVICH, et al.

Present: NYGAARD, ROTH AND BARRY, *CIRCUIT JUDGES*

* * *

ORDER

The foregoing application for a certificate of appealability is denied. Petitioner's claim that the state trial court did not have jurisdiction to resentence him is barred due to procedural default. *See Duncan v. Henry*, 513 U.S. 364 (1995); *Coleman v. Thompson*, 501 U.S. 722 (1991). In any event, the claim also lacks merit; because Petitioner has not demonstrated that the PCRA court was wrong in finding that his sentence was vacated within 30 days of its imposition, his due process claim must fail. 28 U.S.C. § 2254(e)(1);

Exhibit A

see Campbell v. Vaughn, 209 F.3d 280, 290 (3d Cir. 2000). As to the double jeopardy claim, the Superior Court's analysis and determination on direct appeal that Appellant had no expectation of finality, where he was the one to initiate a challenge to his sentence, was neither contrary to nor an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1); *see Williams v. Taylor*, 529 U.S. 362 (2000); *United States v. DiFrancesco*, 449 U.S. 117 (1980).

By the Court,

s/ [illegible]
Circuit Judge

Dated: November 22, 2002

EXHIBIT B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 3, 2003

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-4390

CHRISTOPHER HARRISON,

Appellant

v.

MARTIN DRAGOVICH, WARDEN, SCI MAHANOY; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILA.; THE ATTORNEY GENERAL OF THE STATE OF PA.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 01-cv-00923)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, *Chief Judge*,
SLOVITER, NYGAARD, ALITO, ROTH, MCKEE
RENDELL, BARRY, AMBRO, FUENTES,
SMITH, and BECKER, *Circuit Judges*[1]

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other

1. Judge Edward R. Becker stepped down as Chief Judge on May 4, 2003.

Exhibit B

available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

s/ [illegible]
United States Circuit Judge

DATE: 06/03/03

EXHIBIT C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED NOVEMBER 20, 2001 AND REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED SEPTEMBER 6, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 01-CV-923

CHRISTOPHER HARRISON

v.

MARTIN DRAGOVICH, et al

FULLAM, S.J.

AND NOW, this 20th day of November, 2001, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport, IT IS

ORDERED that:

1. The Report and Recommendation is APPROVED and

ADOPTED.

Exhibit C

2. The petition for a writ of habeas corpus is DENIED.

3. There is no probable cause to issue a certification of appealability.

BY THE COURT:

s/ John P. Fullman
JOHN P. FULLMAN, S.J.

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 01-CV-923

CHRISTOPHER HARRISON

v.

MARTIN DRAGOVICH, et al

ARNOLD C. RAPOPORT
UNITED STATES MAGISTRATE JUDGE

REPORT AND RECOMMENDATION

Before the Court is a counseled petition for a writ of habeas corpus filed by Norris Gelman, Esquire on behalf of Christopher Harrison pursuant to 28 U.S.C. § 2254. The petitioner is currently incarcerated in the State Correctional Facility at Frackville, Pennsylvania. For the reasons that follow, it is recommended that this petition be dismissed and denied without an evidentiary hearing.

Exhibit C

PROCEDURAL HISTORY

On December 14, 1982 the petitioner pled guilty to rape and related charges in the Court of Common Pleas of Philadelphia County.[1] On April 20, 1983 the petitioner was sentenced by the Honorable Alfred DiBona, Jr. to concurrent sentences of imprisonment of four to ten years for rape, involuntary deviate sexual intercourse, and burglary. There was an additional consecutive sentence of five years reporting probation for aggravated assault. Five days later the petitioner filed for a reconsideration of sentence, on the grounds that he was fragile, would not survive in prison, he had learned his lesson, and would commit no further crimes. A Rule to Show Cause was signed by Judge DiBona the same day, which scheduled a hearing for May 25, 1983, and vacated the previous sentence.

A hearing was held on July 13, 1983, and on September 11, 1985 Judge DiBona granted the petition, and reduced the petitioner's sentence of incarceration to one and one-half to three years, and increased the probation component by five years. The petitioner had already served thirty-eight months in prison, so he was released from custody the same day. The petitioner did not appeal the new sentence.

A probation revocation hearing was held on November 28, 1990, wherein it was established that the petitioner had been arrested three times, pled guilty on two of the charges

1. The facts set forth in this procedural history have been taken from the Petition for Writ of Habeas Corpus, the District Attorney's Response to the Petition for Writ of Habeas Corpus, and the state court records attached thereto.

Exhibit C

and was convicted of the third. While the petitioner was on probation, he pled guilty to burglary and possession of an instrument of crime for which he was sentenced to an aggregate sentence of six to twenty-five years imprisonment; he pled guilty in Bucks County to attempted rape, burglary, criminal trespass, aggravated assault, possession of an instrument of crime, simple assault, resisting arrest, loitering and prowling for which he was sentenced to five to twenty-five years imprisonment to be served concurrently with his Philadelphia sentence; and while still on probation, he was convicted of burglary on October 4, 1990 and was sentenced to eight to twenty years imprisonment to be served consecutively to all other sentences. He also committed technical probation violations, i.e. positive for cocaine and marijuana on August 5, 1988, and positive for cocaine on August 18 and 23, 1988. The court revoked his probation in the 1983 resentencing, and sentenced to three consecutive terms of five to ten years imprisonment for involuntary deviate sexual intercourse, aggravated assault and burglary.

The petitioner filed a notice of appeal in the Pennsylvania Superior Court, but the appeal was dismissed for failure to file a brief. On April 18, 1994 the petitioner was granted the right to file an appeal *nunc pro tunc*. He argued that the increase in his sentence after he filed his motion for reconsideration violated the Double Jeopardy clause of the United States Constitution. The Superior Court affirmed the judgment of sentence, and remanded the matter to the lower court to enter the petitioner's credit time on the official record of the case. The petitioner sought discretionary review in the Pennsylvania Supreme Court, which was denied.

Exhibit C

The petitioner sought collateral relief under the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. § 9541, *et seq.* on April 14, 1997. In his counseled petition the petitioner claimed that Judge DiBona failed to vacate his original sentence within thirty days of imposition, and as such the September 11, 1985 order granting the motion for reconsideration of sentence was entered without jurisdiction under state law. The PCRA court dismissed the petition, finding that Judge DiBona had vacated the sentence on April 25, 1983, and that the petitioner failed to establish that the state court lacked jurisdiction. The petitioner appealed to the Superior court, which affirmed the PCRA court, concluding that it was bound by the findings of the PCRA court that the original sentence was vacated on April 25, 1983. The Supreme Court denied the petitioner's request for discretionary review.

The petitioner filed this counseled action on February 3, 2001 seeking federal habeas relief on the grounds that: 1) the resentencing of the petitioner violated the Due Process clause of the Fourteenth Amendment because under state law the court lacked jurisdiction; and 2) the "increase" in the petitioner's resentence violated the Double Jeopardy clause of the Fifth Amendment.

DISCUSSION

This case must be decided pursuant to the terms of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 103-132, 110 Stat. 1214 (enacted April 24, 1996). Section 104(2) of the AEDPA amended 28 U.S.C.

§ 2254, the statute under which this petition was filed, requires the federal courts to give greater deference to a state court's legal determinations.

Section 2254(e) provides that a state court's factual findings "shall be presumed to be correct" and further provides that a habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence". *Berryman v. Morton*, 100 F.3d 1089 (3d Cir. 1996). Section 2254(d), as amended by the AEDPA, requires a petitioner seeking federal habeas relief to "show that the state court's decision was contrary to clearly established caselaw by the [United States] Supreme Court, or alternatively, that the state court's decision was an unreasonable application of Supreme Court caselaw." *Dickerson v. Vaughn,* 90 F.3d 87, 90 (3d Cir. 1996). These standards apply to questions of law or mixed questions of law and fact. *See also Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996); *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *rev'd on other grounds*, 117 S.Ct. 2059 (1997).

The Third Circuit held in *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999) (*en banc*) that § 2254(d) requires a two-step analysis:

> First, the federal habeas court must determine whether the state court decision was "contrary to" Supreme Court precedent that governs the petitioner's claim. Relief is appropriate only if the petitioner shows that "Supreme Court precedent requires an outcome contrary to that reached by the relevant state court." *O'Brien*, 145 F.3d at

Exhibit C

> 24-25. In the absence of such a showing, the federal habeas court must ask whether the state court decision represents an "unreasonable application of" Supreme Court precedent: That is, whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified.

Matteo, 171 F.3d at 891.

To meet the *Matteo* "contrary to" test, the petitioner must not merely show that his interpretation of Supreme Court precedent is more plausible than that of the state court, nor that there is simple disagreement with a reasonable state court interpretation of applicable precedent. In order for a petitioner to obtain federal habeas relief he "must demonstrate that the Supreme Court precedent requires the contrary outcome." (emphasis in original).

The "unreasonable application" standard, does not allow a federal habeas court to grant a writ just because it disagrees with the state court decision, or because it would have reached a different result. "The appropriate question is whether the state court's application of Supreme Court precedent was objectively unreasonable. The federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot be justified under existing Supreme Court precedent." *Matteo*, at 889-90. The Third Circuit went on to state that although habeas courts are not precluded from considering the decisions of lower federal courts when determining whether the state court's application of Supreme court

precedent was reasonable, "federal courts may not grant habeas corpus relief based on the state court's failure to adhere to the precedent of a lower federal court on an issue that the United States Supreme Court has not addressed."

More recently the United States Supreme Court held in *Williams v. Taylor*, 120 S.Ct. 1479 (April 18, 2000) that in order for a petitioner to prevail in a federal habeas action, he must satisfy either the "contrary to" clause or the "unreasonable application clause" of 2254 (d)(1). In order to satisfy the "contrary to Clause" the petitioner must prove that the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decided a case differently from the decision of the Supreme Court on materially indistinguishable facts. Under the "unreasonable application clause" a federal habeas court may not issue the writ simply because, in its independent judgment, the state court applied clearly established law erroneously or incorrectly. *See also Hameen v. State of Delaware*, 212 F.3d 226 (3d Cir. 2000) (*en banc*), *cert. denied*, 2001 WL 261814 (U.S. March 19, 2001).

The petitioner's first claim for relief is that the resentences imposed on September 11, 1985 were void because the state court lacked jurisdiction to alter or amend its original sentences of April 20, 1983 because those sentences had not been vacated within thirty days as required by state statute, and accordingly the revocation of probation sentences imposed on November 28, 1990 were also void. He argues that the prepared orders attached to the petition for reconsideration are handdated May 25, 1983, which would make them untimely under state law. However, the Rule

signed by Judge DiBona on April 25, 1983 has a handwritten notation indicating that the sentence was vacated that day, and the petitioner was to be transferred to the House of Correction.

Prior to bringing a federal habeas action, the petitioner must present all of his claims to the all levels of the state court system in order to comply with the exhaustion requirement of 28 U.S.C. § 2254(b)(1)(A), which states that an application for federal habeas relief shall not be considered unless the petitioner has exhausted the remedies available in the state court. *See Picard v. Connor*, 404 U.S. 270 (1971). The United States Supreme Court addressed the matter in *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) when it stated, "we ask not only whether a prisoner has exhausted his state court remedies, but also whether he has properly exhausted those remedies, i.e. whether he fairly presented his claims to the state courts". (emphasis in original). In order to meet the "fairly presented" requirement, the petitioner must present claims that are the "substantial equivalent" in both fact and legal theory to the state courts that he raises in the federal habeas court. The petitioner must mention the federal Constitution or "call to mind a specific right protected by the Constitution" or allege "a pattern of facts that is well within the mainstream of constitutional litigation". *McCandless v. Vaughn*, 172 F.3d 255, 261-62 (3d Cir. 1999).

In his appeal from the resentencing, the petitioner raised the claim of lack of state jurisdiction due to the vacation of sentence being more than thirty days after original imposition. However, he made that claim on state jurisdictional grounds

and not on due process grounds. Thus, he has not exhausted this claim under the legal theory he now propounds in federal court.

Ordinarily the Court will not address any unexhausted claim; however, the court may excuse the exhaustion requirement if "the petitioner has no opportunity to obtain redress in the state court . . . so . . . as to render any effort to obtain relief futile." *Toulson v. Bever*, 987 F.2d 984, 986 (3d Cir. 1993) (citing *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)); *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1998). "Before exhaustion will be excused, state law must clearly foreclose state court review of unexhausted claims." *Gibson v. Scheidemantel*, 805 F.2d 135, 139 (3d Cir. 1986).

The petitioner has no remedy available to him in the state court, as the amended Post Conviction Relief Act, 42 Pa.C.S.A. § 9541, *et seq.*, effective January 16, 1996 requires that all petitions for collateral relief must be filed within one year of the date the conviction becomes final. The petitioner's conviction was final in 1996 when the Supreme Court rejected his request for discretionary review. In addition, the petitioner has already filed a state collateral action, which was dismissed as meritless. This lack of state recourse causes all unexhausted claims to be procedurally defaulted.

The petitioners procedural default can only be avoided if the petitioner can demonstrate the cause for his default and prejudice from the claimed constitutional error or that the failure to consider his claim will result in a fundamental miscarriage of justice. The United States Supreme Court held

in *Coleman v. Thompson*, 111 S. Ct. 2546, (1991), "[w]e now make it explicit: in all cases in which a state prisoner has defaulted his federal claims in a state court pursuant to an independent and adequate state procedural rule, federal habeas (sic) review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." at 2565. It follows then that a cause and prejudice inquiry must be made as to the petitioner's default. See also *Caswell v. Ryan*, 953 F.2d 853 (3d Cir. 1992).

"Cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Caswell v. Ryan, supra*, citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The Third Circuit has held that "the same standard is also applicable to a prisoner's own default." *Caswell v. Ryan, supra*. Additionally, it is the burden of the petitioner to establish cause for the default and prejudice resulting therefrom. See *Teague v. Lane*, 109 S. Ct. 1060, 1068; *Caswell v. Ryan, supra*; *Coleman v. Thompson, supra* at 2565.

The petitioner has made no cause and prejudice argument which would excuse his procedural default. Thus this claim must be denied.[2]

---

2. It should be noted that even if the petitioner's claim were not procedurally defaulted, it would be meritless. The state jurisdiction issue is a question of state law. As such they are not

(Cont'd)

Exhibit C

The petitioner's second claim for federal habeas relief is the allegation that the petitioner was a victim of double jeopardy when his sentence was increased when his motion for reconsideration was granted by Judge DiBona. This argument is totally without merit. First, the petitioner. himself requested that his sentence be reconsidered as he was "white, frail almost fragile person who is not the type to defend himself against more aggressive prisoners and is subject to be bane for more vicious hardened inmates" (Petition for Reconsideration, Petitioner's Exhibit F). The petitioner also assured the court that he had learned his lesson, and would not commit any further crimes. As noted in the procedural history above, the petitioner did not hold true to his promise.

In response to the petitioner's request for a reduced sentence, Judge DiBona reduced the prison term from four to ten years with five years probation to one and one-half to three years incarceration and ten years probation. As the

---

(Cont'd)

subject to review by a federal habeas court. The United States Supreme Court held in *Estelle v. McGuire*, 502 U.S. 62 (1991) that federal habeas relief does not lie for errors of state law. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a state conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, at 67-68. *See also Pulley v. Harris*, 104 U.S. 37, 104 S.Ct. 871 (1984); *Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092 (1990); *Engle v. Isaac*, 456 U.S. 107 (1982). As the thirty-day jurisdiction requirement to vacate a sentence is a creation of state law and not required by the Constitution or laws of the United States, this claim is not subject to review by this Court.

petitioner had already served thirty-eight months, he was released that same day. The petitioner argues that the "increase" in the petitioner's probation is illegal under *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969).

The double jeopardy clause only applies to a sentence when there is an expectation of finality, such as an acquittal or a sentence which is not appealed, nor reconsidered. *Monge v. California*, 524 U.S. 721 (1998). In this case the sentence was reconsidered *at the petitioner's request*; thus .the petitioner was asking that the "finality" of his sentenced be changed. In exchange for far less prison time, he was given more probation time. As he sought less incarceration, he cannot argue that his expectation of finality was legitimate and denied. The state court's application of federal law was neither contrary to nor an unreasonable application of federal law, and this claim must be denied as meritless.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 5 day of Sept, 2001, IT IS RESPECTFULLY RECOMMENDED, that the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, be DENIED AND DISMISSED. There is no probable cause to issue a certificate of appealability.

BY THE COURT:

s/ Arnold C. Rapoport
ARNOLD C. RAPOPORT
UNITED STATES MAGISTRATE JUDGE